Supreme Court,
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No. 338

In the

Supreme Court of the United States.

October Term, 1922.

ELI BUNCH, *Petitioner,*

VERSUS

J. B. COLE AND T. B. MATHEWS, *Respondents.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF OF RESPONDENTS.

BENJ. MARTIN, JR.,
Attorney for Respondents.

IN THE

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Statement by Respondents.

We hereby accept the statement of facts as set forth and detailed in the brief of the petitioner herein.

BRIEF *and* ARGUMENT.

I.

It is contended by the respondents that even though the rental contract entered into by and between the petitioner and the respondents for the

years 1917 and 1918 were void because made before the end of the year or too long before the contracts became effective or were to begin, still the respondents, having taken possession of the land under these contracts and paid the cash consideration for the rental thereof and being permitted to remain in possession by the petitioner, Eli Bunch, and having accepted the rentals provided for in said contracts in full satisfaction of the rentals, then these respondents were tenants at will of the said Eli Bunch, petitioner under said void contract.

The case of *Guffy* v. *Pollan*, found in 175 Pac., at page 817, was a case where written instruments were executed by Mary Turkey and her husband who were restricted Indians at the time of the execution of these instruments and is on all-fours with the present case in holding that the lease under which defendants entered was void because of federal restrictions, still the parties were in possession under this void lease and as such became tenants at will or from year to year.

The first syllabus of this opinion is as follows:

> "A tenant in possession under a void, or defective lease for a term of years creates a tenancy at will, and if periodical rent be paid, the tenancy becomes one from year to year—following *Peters* v. *Holder*, 40 Okl. 93."

And in the body of the opinion the court holds as follows:

> "Although it appears from the evidence that the tenant, Pollan, was in possession of the

premises in dispute under a void lease, it appears that he had been in possession and had paid yearly rental for the years 1914 and '15, and had occupied the premises for the year 1916. Although the lease under which he held may have been void, yet he was a tenant from year to year, and was not subject to have the tenancy terminated at the time the suit was instituted October 3, 1916. It was said by the court in *Peters* v. *Holder,* 40 Okl., at page 96: 'An entry under a void, or defective, lease for a term of years creates a tenancy at will, and if periodical rent be paid the tenancy becomes one from year to year.' Citing *Tate* v. *Gaines,* 25 Okl. 141; 24 Cyc 1031—citing a long list of authorities in support of that proposition. Therefore, Holder held as a tenant from year to year and until his tenancy was terminated by three months' notice in writing."

It cannot be said that this doctrine will not apply to restricted Indians, for the reason that the above cited case was one of a full-blood restricted Indian making a written lease on her land. This decision holds that under such a lease the lessee becomes tenant at will of the lessor.

In the case of *Peters* v. *Holder,* found in 136 Pacific, at page 400, quoting from the second syllabus, this language is used:

> "A tenant in possession under a void, or defective lease for a term of years creates a tenancy at will and, if periodical rent be paid, the tenancy becomes one from year to year. Citing *Tate* v. *Gaines,* 25 Okl. 141; 24 Cyc 1031. And other cases see Landlord & Tenant Cent. Dig., paragraphs 373 to 381, 402-415."

In the case of *Tate* v. *Gaines,* 105 Pac., at page 193, the syllabus reads as follows:

> "An allottee of land in the Creek Nation, which was inalienable by virtue of the provisions of Act of Congress March 1, 1901, for valuable consideration made, executed, and delivered a warranty deed thereto, and accompanied the same with a contract, which provided substantially that should the said grantor, at any time, become dissatisfied with the sale, or fail or refuse to carry out the provisions of the deed, she would pay to the grantee, his heirs, or assigns, all money paid for the purchase price of said land and for all improvements made thereon, less a reasonable allowance for rents for the use of the land during the time grantee held it.
>
> "The grantor exercised her right to repossessing herself of the land without a repayment of the moneys as agreed in the contract. Grantee brought suit for the same, and at the same time tendered a deed of conveyance to the land. To his petition setting up substantially the foregoing facts a demurrer was filed, which was by the trial court sustained. *Held, error.*"

In the body of this opinion, Judge DUNN refers to the case of *Rogers, et al.,* v. *Hill,* decided by the Court of Appeals of the Indian Territory, reported in 3 Ind. Ter. 562, 64 Southwestern Reporter 536, in which Judge DUNN says:

> "In that case, as in this, there was an invalid conveyance or contract of sale and of the possession of the grantee the court said: 'It has been uniformly held that possession under an invalid conveyance or contract of sale creates

a tenancy at will, and where a tenant goes into possession under an invalid lease his tenancy at its inception is merely a tenancy at will.' Citing *Hall* v. *Wallace,* 88 Cal. 434, 26 Pac. 360; *Packard* v. *Railroad Co.,* 46 Ill. App. 244; *Lehman* v. *Nolting,* 56 Mo. App. 549; *Howard* v. *Merriam,* 5 Cush. (Mass.) 583; *McIntosh* v. *Lee,* 57 Iowa 356."

Thus it will be seen from the above decisions that it is the established law of this state by our Supreme Court, that where a tenant goes into possession of the land, even that of a full-blood restricted Indian, under a defective, or void lease, his possession is that of a tenant at will. This is bound to be so because a tenant is in possession with the consent and full authority of the owner, and hence cannot be treated as a trespasser. Therefore, we conclude that it is an incontrovertible fact that Cole and Mathews, the respondents, were in possession of the land in controversy during the years 1917 and '18, as tenants at will of the petitioner, Eli Bunch.

II.

Having determined from the above authorities that the respondents were tenants at will of Eli Bunch, petitioner, the next question which naturally presents itself is this:

What rental must they pay for the use of this land during this time?

This question is fully and completely answered by the following authorities which we present:

In the case of *Nash, et al.*, v. *Berkmeir*, 83 Ind., page 536, the first syllabus reads as follows:

> "A wife's parol lease of her land for a term of five years, made without her husband's concurrence, may be enforced in respect to the terms for payment of rent against the lessee holding possession under the lease. In this case the lease was oral and held for five years when the statute of fraud in that state prohibited an oral lease for a longer period than three years, and a lessee was held by this decision to be a tenant from year to year, and in concluding the case, after citing numerous authorities, the court held: 'By a plain analogy of these decisions, and in harmony with the just and equitable principles which underlie them it must be held that so long as appellee retains the possession which he obtained under, and in consequence of the lease in question, he must pay rent according to its terms. Further than this the case does not require us to go; to stop short would be to convert the law into an instrument of fraud'."

In the case of *Evans* v. *Winona Lumber Co.*, found in the 16th volume of the Northwestern Reporter at page 404, the court in its syllabus uses this language:

> "An oral lease for a term of three years, with a right in the lessor to terminate at any time upon four months' notice is void under section 10, chapter 41, Gen. Statute 1878, as being for a term 'exceeding one year.' But if the lessee goes into possession under it, it regulates the terms of the tenancy as respects rents. In this case the plaintiff orally leased said prem-

ises to defendant at an annual rent of $300.00 for a term of three years. Upon this state of facts plaintiff is entitled to recover the annual rent fixed by the oral lease, namely the sum of $300.00. The lease is for three years, subject to the lessor's right of termination; that is to say, it is liable to be defeated by something in the nature of a contention subsequent, to-wit: An affirmative act on the part of the lessor. Until this act is done it is in form a lease for three years, and therefore void under section 10, chapter 41, Gen. Statute 1878, as being for a term 'exceeding one year.'

"But though void as a lease, the rule is that if the lessee goes into possession under it, it regulates the terms of the tenancy as respects rents. (Citing *Laughran* v. *Smith*, 75 N. Y. 205; *Thurber* v. *Dwyer*, 10 R. I. 355; *Larkins* v. *Avery*, 23 Conn. 304; *Morrill* v. *Mackman*, 24 Mich. 279; Taylor Landlord & Tenant, paragraph 80; Wood Landlord & Tenant, paragraph 25.)

"This ruling may not be logical; very likely it is not as an original proposition, but if it is the ruling established by the authorities there can be no doubt. We have not had our attention caalled to any authority to the contrary, nor have we discovered any."

In the case of *Steele* v. *Anheuser-Busch Brewing Association*, 57 Minn. 18, the Supreme Court of Minnesota, in 1894, used this language in its syllabus:

"*Evans* v. *Lumber Co.*, 30 Minn. 515, followed to the effect that a lease void under the statute of fraud will nevertheless regulate the terms as to rent if the tenant goes into possession and occupies the premises."

In the case of *Albert D. Thurber and another* v. *Thomas Dwyer,* found in the 10th volume of the R. I. Reporter at page 355, this language is used in the syllabus:

> "*Held,* further, that although void as to the duration of the time thereof, it nevertheless regulated the terms of the tenancy in other respects and made it a holding from year to year, which might be terminated by giving notice in writing at least three months prior to the expiring of the occupation year."

And in the body of the opinion the court uses this language:

> "Although the lease be void as to duration of term it nevertheless regulates the terms of the tenancy in other respects and the tenant who enters under it is held to be a tenant from year to year upon those terms."

In the case of *Snyder, et al.,* v. *Harding,* found in the 80th Pacific, page 789, a written lease was entered into between the owner of the land and O. G. Harding for a term of three years, which lease was held to be void for the reason that all of the owners thereof had not signed the lease, or entered into the contract. Harding went into possession under this void lease and cultivated the land for the year 1900, in which lease contract he agreed to pay a one-third of the grain raised on the said place to the owners of the land, and for the first year, to-wit, 1900, he gathered the crops and accounted to the owners of the land for one-third value of all grain raised, which they accepted, and he remained on the place

to make a crop for the year 1901. After he had started the crop the owners of the land brought suit against him, contending that his contract was void and got a restraining order restraining said Harding from removing any of the crops from the place, or, in any manner, disposing of same.

Afterwards by agreement between all of the parties the crops raised during the year 1901 were sold and the proceeds thereof placed in the hands of the clerk to be held by him for final decision by the court. The plaintiffs recovered judgment in the Supreme Court for the possession of the land, but nothing was said as to the distribution of the money in the hands of the court held as proceeds for the crop for the year 1901, and after the case was affirmed Harding, the lessee, then moved for a distribution of the money awarding to himself two-thirds and the owners of the land one-third, which was resisted by the owners of the land upon the ground that the lease was void and he (Harding) had no rights whatever, of any kind, to the premises.

The court hearing said motion granted the same and gave to Harding, the lessee, two-thirds of the money deposited in the court as the proceeds of said crop, and the owners of the land one-third of said money, from which decision the owners of the land appealed again to the Supreme Court, and the Supreme Court affirmed the decision of the lower court, and used this language in the second syllabus:

> "Where a lessee took possession of premises under an invalid lease stipulating that the

lessee should have three-fourths of the crop raised and the landlord one-fourth thereof, and raised a crop, the crop should be divided between the parties on the basis fixed in the lease."

In the body of the opinion the court uses this language:

"The respondents then being entitled to the tenant's share of the crop the only question remaining to be considered is: How were the crops to be divided? The lease provides as for the year 1901, appellant should be entitled to one-fourth and the respondents to three-fourths, and the trial court made the division on that basis. Was the lease to be considered in making such division? We think it was. In determining the term of the periodical tenancy created by the entry and payment of rent reference may be made to the invalid lease, and the lessee becomes bound by stipulations therein applicable to the periodical lease. 18 Am. & Eng. Ency. of Law, (2nd ed.) 195-196; *Nash* v. *Berkmeir,* 83 Ind. 536; *Steele* v. *Anheuser-Busch Brewing Association,* 57 Minn. 18; *Kennochan* v. *Wilkins,* 3 App. Div. 596, 38 N. Y. Sup. 236."

Thus we see from the above authorities the courts hold that even though a tenant is occupying land under a void lease contract, yet it is the duty of the court to look to the void lease in determining the amount of rentals to be paid.

Now, applying this law to this case, what, we ask, would be the rentals to be paid by the respondents? In the agreed stipulation it is admitted that in these rental contracts the respondents paid to the

petitioner the sum of $75.00 rental for each of the years 1917 and 1918, and that petitioner Eli Bunch accepted said sum from the respondents as a full satisfaction for the rental of said land for said two years.

Thus we contend that the petitioner has no cause of action against the respondents, and that the court at the conclusion of the petitioner's testimony should have sustained the demurrer of the respondents to the evidence, and at the conclusion of all the evidence the court should have sustained the motion of the respondents for a peremptory instruction to the jury to return a verdict in favor of the respondents.

III.

We submit herewith the opinion rendered in this cause by the Supreme Court of the State of Oklahoma and make the same a part of our argument as to why this case should be affirmed in this court:

"*In the Supreme Court of the State of Oklahoma. J. B. Cole and T. B. Mathews, Plaintiffs in Error, vs. Eli Bunch, Defendant in Error. No. 11230.*

SYLLABUS.

"Filed in Supreme Court of Oklahoma, May 31, 1921. William M. Franklin, Clerk.

"*1.* Any person in the possession of real property, with the assent of the owner, is presumed to be a tenant at will unless the contrary is shown, except as herein otherwise provided. Section 3783, R. L. Okla. 1910.

"*2.* A tenant in possession of land under a void or voidable lease for one or more years creates a tenancy at will.

"*3.* A tenancy at will is an estate which simply confers a right to the possession of the premises leased for such indefinite period as both parties shall determine such possession shall continue.

"*4.* Where an Indian leases his restricted land for a cash rental, even though the lease be void and the tenant is permitted to occupy the premises during the term of the lease, such Indian cannot thereafter maintain an action to recover the rental value of the land based on a share of the crop for the year so rented.

"*5.* Where a tenant enters into possession under a void lease and he is permitted by the landlord to retain such possession, the terms specified in the lease for the payment of rent governs the tenant's liability for rent and the landlord's right to recover for the use and occupancy of the premises.

"Error from the District Court of Muskogee County, Oklahoma. Benjamin B. Wheeler, Judge.

"Action by Eli Bunch against J. B. Cole and T. B. Mathews to Recover Rents on Farming Land. Judgment for the Plaintiff. Defendants Appeal. Reversed.

"W. J. Crump, R. P. deGraffenried, Myron White, Attorneys for Plaintiffs in Error.

"William Neff, L. E. Neff, Harry G. Davis, Attorneys for Defendant in Error.

"*Opinion of the Court by* MILLER, J.—This action was commenced in the District Court of Muskogee County on June 5, 1919, by Eli Bunch

as plaintiff against J. B. Cole and T. B. Mathews, defendants, to recover the rental value of certain land belonging to the plaintiff for the years 1916, 1917 and 1918. The case was tried to a jury and at the close of the trial the court gave a peremptory instruction to the jury to return a verdict in favor of the plaintiff for a certain sum and the court thereupon rendered judgment on the verdict of the jury. The defendants filed a motion for a new trial which was overruled and perfected this appeal. For convenience the parties will be referred to as they appeared in the court below.

"The petition states that the plaintiff is a full-blood Cherokee Indian and so enrolled. Plaintiff's claim is for the use of eighty acres of land, forty acres of which is his homestead allotment and the remaining forth acres a part of his surplus allotment. That by reason of certain acts of Congress his allotment was inalienable and he could not lease the homestead for more than one year at a time. That it is bottom land and approximately forty acres was in cultivation and the remaining part in timber and pasture. Defendants had the use of the land during the years of 1916, 1917, 1918. Part of the cultivated portion of the land was put in cotton and part in corn each year. He states that in May, 1917, he enlisted in the United States Navy and served in the Navy until he was discharged in January, 1919. He then asks that he recover $2,625.00 as rents for the years 1916, 1917 and 1918 and exemplary damages in the sum of $1,000.00.

"The defendants filed an answer setting up rental contracts for this land for the years 1916, 1917 and 1918 and alleged the rents had been paid under the terms of the contract. To this

answer plaintiff filed a verified general denial. It will not be necessary to make any detailed statement of the defense set up in the answer as practically all of defendant's defense has been agreed to in a stipulation of facts entered into by the parties, which is as follows: 'It is hereby agreed by and between the plaintiff by his attorneys, Messrs. Neff & Neff, and the defendants by their attorneys, Messrs. Crump, de Graffenreid & White, that the following statement of facts are agreed to and may be offered in evidence in this case: *First.* That the plaintiff, Eli Bunch, is a full-blood Cherokee Indian enrolled and recognized as such. *Second.* That he is the allottee of the land described in plaintiff's petition and is now, and has been, the legal owner thereof. *Third.* That during the year 1915 the plaintiff rented said land to the defendants for agricultural purposes by written contract for one year and by the terms of which the defendants were to pay the plaintiff $75.00 for the use and occupancy of the said land for the year of 1916, and that said sum was fully paid by the defendants in cash and accepted by the plaintiff in full satisfaction for the rent of said land for the year of 1916. That said contract was dated and executed on October 4th, 1915, for the use of said land for the year 1916, and that these defendants used and occupied said land under said written contract. *Fourth.* That during the year of 1916, to-wit, on July 5th, 1916, the plaintiff again rerented said land to these defendants for the year of 1917 by written contract executed on said date and by the terms of which these defendants were to use and occupy said land during the year of 1917 for a cash rental of $75.00, which said sum was then and there paid by defendants and accepted by the plaintiff in full for the use and

occupation of said premises for the year of 1917, and that defendants occupied said land during the year of 1917 as tenants of plaintiff under said contract. *Fifth.* That during the year of 1917, the plaintiff became a soldier of the United States Government and was enlisted in the navy, during said year he was stationed at New York under the control of the Government, and that while in New York these defendants by J. B. Cole wrote to the said plaintiff in regard to leasing the land for the year of 1918, and asked for a rental contract on same and that the plaintiff, Eli Bunch, in reply to this letter advised the defendants that he had left his allotment in charge of Mary Sunday, his mother, and that they must go to see her in regard to renting it. And thereafter, to-wit, on July 28th, 1917, these defendants went to see Mary Sunday, the mother of the plaintiff in regard to the renting of said land and thereupon the said Mary Sunday as the agent of the plaintiff Eli Bunch, entered into a written contract as such agent with these defendants, by the terms of which written contract she let and rented to these two defendants the said allotment of land for the year 1918, for a cash consideration of $75.00, and these defendants used and occupied said land during the year 1918 under said written contract entered into with Mary Sunday as the agent of the plaintiff. And it is further agreed that this stipulation may be regarded as part of the pleadings for the purpose of motion on judgment on the pleadings. Neff & Neff, Attorneys for Plaintiff. Crump, de Graffenried & White, Attorneys for Defendants.'

"The defendants then filed the following motion for judgment on the pleadings: 'Comes now the defendants and moves the court to grant them a judgment on the pleadings together with

the stipulation of facts filed herein and of this they pray judgment of the court.'

"This was overruled by the court. Thereafter a trial was had with the results as above stated. The defendants make several asignments of error. Before considering any of them, we wish to observe that the record discloses plaintiff to be a very intelligent Indian, he having had seven years' schooling in the Chilocco Indian School and two years in the common schools before going to Chilocco. It will only be necessary to consider the motion for judgment on the pleadings and stipulation of facts. The motion should have been sustained.

"The defendants in error have cited a large number of cases which as we view this case have no application and it will not serve any good purpose to point out the distinguishing features.

"The only reason claimed that these leases were void is that they were made prior to the date of the beginning of the lease. The courts have recognized that it was often necessary and to the best interest of the Indian to lease his land prior to the first day of January of the year for which the land is leased.

"The plaintiff was satisfied with the rental for the year 1916 of $75.00 and made no complaint. He certainly could not make a complaint two or three years thereafter. In 1916, he was willing to lease his land for the year 1917 for a cash rental of $75.00. The defendants continued in possession and put in their crops, all of this occurring before he enlisted in the Navy and he made no objections to it. He certainly cannot be heard to complain two years later. In July, 1917, he instructed the defendants to make arrangements with his mother for the leasing

of the land for 1918. Under this instruction they did arrange for the leasing of the land and on the same terms that he had been willing to lease it for the preceding years. They paid the cash rental in advance as had been their custom and it does not appear that any undue advantage was taken. If the lease was void so that he could have demanded possession of the premises but failing to demand possession he waived that right, therefore a tenancy at will existed.

"This was held in *Peters* v. *Holder*, 40 Okl. 93, 136 Pac. 400: 'A tenant in possession under a void or defective lease for a term of years creates a tenancy at will, and, if periodical rent be paid, the tenancy becomes one from year to year. *Tate* v. *Gaines*, 25 Okl. 141, 105 Pac. 193, 26 L. R. A. (N. S.) 106; 24 Cyc 1031.'

"Section 3783, Revised Laws of Oklahoma, 1910, provides: 'Any person in the possession of real property, with the assent of the owner, is presumed to be a tenant at will unless the contrary is shown, except as herein otherwise provided.'

"In *Tate* v. *Gaines*, 25 Okl. 141, 105 Pac. 193, DUNN, J., quotes approvingly from *Cunningham* v. *Holton*, 55 Mo. 33, which court defines a tenancy at will as follows: 'A tenancy at will is an estate which simply confers a right to the possession of the premises leased for such indefinite period as both parties shall determine such possession shall continue. The estate may arise by implication as well as by express words.'

"Conceding the lease to be void, the rule is that if the tenant goes into possession under the lease and holds under the lease the terms of the lease stipulating the amount of rent to be paid

shall govern the rents the landlord is entitled to receive as well as the amount of rents the tenant is liable for.

"*Evans* v. *Winona Lumber Co.*, 16 N. W. 404; *Laughran* v. *Smith*, 75 N. Y. 205; *Thurber* v. *Dwyer*, 10 R. I. 355; *Larkins* v. *Avery*, 23 Conn. 304; *Morrill* v. *Mackman*, 24 Mich. 279.

"If the plaintiff had been seeking to obtain possession of the premises because the lease was void a very different question would be presented here. It is urged by the plaintiff that he was in the Navy from May, 1917, until the end of the year 1918. This is all true and we believe that every protection should be given the boys who responded to the call of their country.

"If we say the acts of an agent duly appointed by a person while they were in the service of either the army or navy may be ignored at will, it will open the door for all kinds of fraud. Such a rule would make it unsafe for any person to deal either with the soldier or his agent in any way. The result would be that all of the real estate of the soldier would remain idle and he would not recive any income whatever from it. If he rented the land for cash rent, he could rescind the cash payment clause in the contract and demand that the tenant account on a basis of a share of the crop. If he rented it for a share of the crop and the tenant delivered the agreed share as per the contract, he could then say the rent received was not enough and that it was worth a certain sum on a cash basis and demand settlement on that basis. If any such rule had been established before the war, or if it was known such a rule would thereafter be established, it would have been unsafe for any person to contract to rent land belonging to a sol-

dier or belonging to a person that by any possible means might become a soldier. As a result millions of acres would have been uncultivated at the very time the products of the soil were most needed.

"The plaintiff contends: 'That where the Chairman of the Council of Defense took charge of the land of a soldier under contracts conceded to be void, and rented the same out, he is chargeable as a trustee for what he collected; that the chairman of the Council of Defense cannot be allowed to deny that the land was actually worth what he received for its use;' this has no application for this plaintiff specifically designated his mother as his agent to attend to the leasing of the land for him. The chairman of the Council of Defense had nothing to do with it.

"The plaintiff makes a further statement in his brief (brief of defendant in error) that the lease was void for the reason that Cole and Matthews sublet the land to other parties. This might be grounds to dispossess the persons in actual possession of the premises, but does not in any way affect the rights of the parties in this action.

"The judgment of the trial court is reversed with instructions to sustain the motion of the defendants for judgment on the pleadings and stipulation of facts, and render judgment in favor of the defendants and against the plaintiff..

"HARRISON, C. J., JOHNSON, MCNEILL, ELTING and KENNAMER, J. J., concur."

Under this opinion there are but two questions for decision; *1st*, under the state of facts as agreed to in this case are the respondents tenants at will of

the petitioner? And we submit that this question is fully and ably discussed by the opinion referred to in this brief; and the *second* question, if the respondents are held to be tenants at will of the petitioner and even though the leases that they took possession under were void, how are you to arrive at the price to be paid by the respondent? and we contend that this question is fully answered by the decisions referred to in our brief.

We respectfully submit this cause believing that the judgment of the Supreme Court of Oklahoma should be in all things affirmed.

Respectfully submitted,

BENJ. MARTIN, JR.,
Attorney for Respondents.